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In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS P. VANN AND JAMES E. MELHORN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' Confrontation Clause rights were violated by the admission of co-conspirators' prior statements in conformity with Fed. R. Evid. 801(d)(2)(E).

2. Whether evidence of petitioners' prior participation in bidrigging conspiracies was properly admitted under Fed. R. Evid. 404(b) to prove intent to enter the bidrigging conspiracy, which was put at issue by petitioners' arguments to the jury.

3. Whether petitioner Vann's Sixth Amendment right to consult with counsel was violated by the court of appeals' decision not to postpone argument due to Vann's illness where his trial counsel had already filed all briefs on the merits without an objection on this ground, and where petitioner's motion to postpone oral argument was made only eight days prior to the date scheduled for argument.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) and its order denying petitioner Vann's motion to postpone oral argument (Pet. App. 10a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1983. A petition for rehearing was denied on May 13, 1983 (Pet. App. 12a). The petition for a writ of certiorari was filed on July 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 18, 1981, a federal grand jury in the Middle District of Tennessee indicted Ashland-Warren Inc. ("Ashland"), the nation's largest highway paving contractor, as well as petitioners Thomas P. Vann and James E. Melhorn, who were the president and vice president, respectively, of

Ashland's Knoxville, Tennessee, division. The indictment charged the company and the individuals with one count of rigging bids on interstate highway projects in Tennessee, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and five counts of related mail fraud. The Sherman Act count against the individuals was severed from the remaining counts and from all charges against Ashland. At the close of a ten-day trial, the jury found both Vann and Melhorn guilty on the antitrust count. The district court imposed suspended sentences of two years on Vann and one year on Melhorn and ordered them to pay fines of $10,000 and $5,000, respectively.

1. Petitioners do not challenge the sufficiency of the evidence presented against them at trial. Briefly, the evidence established that petitioners, as executives of Ashland, and Carl Riddle and Stan Fugate, as executives of Interstate Paving Company, Ashland's ostensible competitor, agreed to divide between themselves two contracts to be let during 1979 by the State of Tennessee for work on Interstate 81. The four men agreed to rig the bids so that Ashland would be low bidder on Contract No. 8148, while Interstate would win Contract No. 8175, which was to be bid a few months later. Tr. 74, 91-93, 293-296.[1] Fugate, Vann, and Melhorn also determined which prospective bidders each company would contact in an effort to talk them out of bidding competitively on No. 8148. Tr. 77-80. The night before the bids were submitted on No. 8148, petitioners Vann and Melhorn met with Riddle and Fugate and reached a firm agreement that Ashland "would be the contractor on Contract 8148 and when in fact 8175 came,

[1] "Tr." refers to the trial transcript.

[Interstate] would be the prime contractor on that job." Tr. 96; see also Tr. 91-93, 293-296.[2]

Later that night Melhorn called Fugate and asked Interstate to submit a "complementary" bid — that is, an intentionally high bid — on No. 8148; Melhorn requested that Interstate submit a bid greater than $2.5 million. Tr. 103, 301-302. Interstate complied with Melhorn's request. Ashland bid approximately $2,350,000, but lost the job when D.R. Allen, a company that Vann had been unable to reach, submitted a lo bid. Tr. 105, 302-303. Vann told Riddle that he had made a "bad gamble" with respect to Allen and had assumed (erroneously) that Allen would not submit a bid. Tr. 302-303. After numerous conversations and meetings during the ensuing month between representatives of Ashland, Interstate, and Allen, an agreement was reached pursuant to which Vann, Melhorn, Riddle, and Fugate ultimately paid Allen $250,000, which was provided by Interstate and Ashland in order to have No. 8148 subcontracted to Ashland. As part of that arrangement, Allen also agreed not to bid on No. 8175. Tr. 312, 770-771.

The conspirators next turned their efforts toward rigging the bids on No. 8175 to allow Interstate to win that contract. To this end, Fugate and Riddle contacted several companies, none of which evinced an interest in the project. Tr. 112-115, 513-515, 553. Two other companies were given

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[2]Later that same night, Vann, Melhorn, Riddle and Fugate met with personnel of Vulcan Materials, a supplier of quarry stone. Vann, acting as principal spokesman, told Vulcan that Ashland and Interstate "anticipated running [No. 8148] out of Ashland's plant" and purchasing the necessary crushed stone from Vulcan's competitor. Tr. 99, 161-162, 256-259. To mollify Vulcan, the conspirators suggested, among other alternatives, that Vulcan could sell stone to Interstate when it won No. 8175. Tr. 257, 295. Finally, the four conspirators offered to have Ashland purchase some of the stone for No. 8148 from Vulcan. Tr. 300

payments in exchange for agreeing to submit "complementary" bids.[3] Tr. 123. Finally, on the night before the bidletting, Fugate called Vann and asked him to submit a complementary bid of approximately $2.6 million. Vann agreed, and bid as requested. Tr. 122-123, 329.

Although the bidding came out as the conspirators had planned, the State rejected Interstate's bid as too high and rescheduled the bidlatting for three months later. GX 27, 28, Tr. 123. In the interim, Vann and Fugate renewed their agreement to rig No. 8175. Tr. 124-125. Once again, Fugate called Vann on the night before the letting and requested Vann to submit a bid on No. 8175 in approximately the same amount as Ashland's original bid. Vann agreed and submitted the bid as requested. Tr. 129. Interstate won the job with approximately the same bid that had originally been rejected by the State as too high. G.X. 32, Tr. 129-130.

2. The court of appeals affirmed petitioners' convictions in an unpublished order. The court first rejected petitioners' argument that evidence of similar acts of bidrigging had been improperly admitted. The court noted that at trial petitioners had argued that they were "merely present" at bidrigging meetings and had "never agreed to participate in the conspiracy." The court reasoned that "[b]y asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue." Pet. App. 6a. The court also rejected petitioners' contention that the trial court abused its discretion in admitting the evidence. *Id.* at 7a.

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[3]Tillett Brothers was paid $25,000 in exchange for its agreement to submit a complementary bid of $2.7 million on the project. Tr. 316-322, 758-768. And when Vann and Fugate approached Nate Pendleton, another competitor, on the night before the bidletting to ask if Pendleton planned to bid on No. 8175, Pendleton responded that "he needed some work" and that he had a storage bin for sale. Tr. 116. Later that night, Fugate called Pendleton and worked out an agreement in which Fugate agreed to buy the storage bin and Pendleton agreed to submit a complementary bid of $2.7 million on No. 8175. Tr. 116-122.

The court next rejected petitioners' contention that co-conspirators' statements had been admitted in violation of the Confrontation Clause. The court found that two of the statements at issue had not been admitted for the truth of the matters asserted, but only to explain the activities of the witness. The court therefore concluded that these statements were not hearsay and had properly been admitted. *Ibid.* The court found that admission of the remaining statements was proper under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause. Pet. App. 7a-8a. The court expressly declined to decide whether statements admissible under the Federal Rules of Evidence automatically comply with Confrontation Clause requirements. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners do not dispute the fact that the co-conspirator testimony to which they object was properly admitted pursuant to Fed. R. Evid. 801(d)(2)(E). Rather, they contend (Pet. 10-15) that even if a co-conspirator statement statisfies that rule, its admission may nevertheless violate the Confrontation Clause. They assert that the court of appeals' decision in this case "rested in part" (Pet. 11) on a contrary interpretation of the Confrontation Clause and thus conflicts with decisions of this Court and other courts of appeals. In fact, however, petitioners incorrectly state the holding of the court below, and the conflicts they allege simply do not exist.

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[4]The court rejected petitioners' remaining arguments without discussion (Pet. App. at 8a), and petitioners do not seek review of those issues.

The out-of-court declarations in question were admitted into evidence through the testimony of Fugate. As the court of appeals properly found (Pet. App. 7a), much of his testimony concerning his encounters with other co-conspirators was not admitted for the truth of the matters asserted therein. Such testimony raises no Confrontation Clause issue since it merely described Fugate's own activities. *Ibid.* The remaining statements, which were admitted under Fed. R. Evid. 801(d)(2)(E), did not mention either petitioner or purport to describe any of their actions or statements.

On these facts, the court of appeals expressly declined to decide "whether the admission of evidence under * * * Fed. R. Evid. 801(d)(2)(E) raises Confrontation Clause problems." Pet. App. 8a. The court observed, however, that the statements satisfied any independent Confrontation Clause requirements because the evidence was "neither crucial to the prosecution nor devastating to the defendant * * *" (Pet. App. 8a). Under these circumstances, there was no violation of the Confrontation Clause. *Dutton* v. *Evans*, 400 U.S. 74 (1970).

Petitioners' claim (Pet. 10-12) of a conflict among the circuits is also incorrect. The Third Circuit opinion on which petitioners (Pet. 10-12) and amicus National Association of Criminal Defense Lawyers (Br. 13) rely — *United States* v. *Gibbs*, 703 F.2d 683 (3d Cir. 1983) — has been vacated and set for rehearing en banc on this issue. *United States* v. *Gibbs*, No. 82-1096 (3d Cir. Orders of May 19, 1983 and July 21, 1983). The opinion below is also fully consistent with Ninth Circuit precedent holding that unavailability need not be proved where the co-conspirators' statements are neither "crucial" to the prosecution nor "devastating" to the defense. See *United States* v. *Perez*,

658 F.2d 654, 661-662 (9th Cir. 1981).[5] Similarly, the Fifth Circuit has held that otherwise admissible co-conspirator statements do not violate a defendant's Confrontation Clause rights even where unavailability of the absent declarant has not been shown. See *United States* v. *Martinez*, 555 F.2d 1248, 1249 (5th Cir.), cert. denied, 434 U.S. 924 (1977)); *Park* v. *Huff*, 506 F.2d 849, 860 (5th Cir.) (en banc), cert. denied, 423 U.S. 824 (1975).[6]

Nor does the opinion below conflict with prior decisions of this Court. In *Dutton* v. *Evans, supra*, this Court rejected a Confrontation Clause challenge to the admission of co-conspirator testimony under state law. The plurality opinion in *Dutton* viewed the question presented by co-conspirator testimony solely in terms of the "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89 (plurality opinion). This ruling was not reversed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), as petitioners contend (Pet. 10-15). The *Roberts* Court stated that the Confrontation Clause places two constraints on the introduction of otherwise admissible hearsay: (1) in "the usual case," the evidence must be necessary, *i.e.*, "the prosecution must either produce, or demonstrate the unavailability of, the

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[5]Another Ninth Circuit opinion cited by petitioners (at Pet. 11 n.7), *United States* v. *Fielding*, 630 F.2d 1357, 1366-1367 (9th Cir. 1980), was vacated on rehearing and replaced by an opinion that decided the case on nonconstitutional grounds. See 645 F.2d 719, 728, n.16 (9th Cir. 1981). Cf. *United States* v. *McKinney*, 707 F.2d 381 (9th Cir. 1983) (admission of statement violated Confrontation Clause because it did not fall within rule for adoptive admissions; dictum concerning relationship between Confrontation Clause and co-conspirator exception).

[6]In *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cited by petitioners (Pet. 11 n.7), not only were the declarants unavailable (they were dead), but the court inferred that their statements were reliable because they fell within the co-conspirator exception.

declarant whose statement it wishes to use against the defendant"; and (2) the evidence must satisfy certain "indicia of reliability." 448 U.S. at 65-66. But contrary to petitioners' suggestion, *Roberts* did not involve either the Federal Rules of Evidence in general or Rule 801(d)(2)(E) in particular. See 448 U.S. at 58-61. And when the Court stated that a showing of unavailability was required "in the usual case," it was careful to state explicitly that "[a] demonstration of unavailability, however, is not always required," citing *Dutton*. See 448 U.S. at 65 n.7. Indeed, the Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66.[7]

2. Petitioners also contend (Pet. 15) that the court of appeals improperly upheld the admission of prior similar acts — in this case, prior instances of bidrigging — to show a propensity to commit the crime at issue. On the contrary, however, admission of that evidence was upheld under Fed. R. Evid. 404(b), which expressly provides that evidence of prior criminal acts is admissible to prove, among other things, intent, knowledge, or the absence of mistake or accident. See also *United States* v. *Park*, 421 U.S. 658, 676-678 (1975); *United States* v. *Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976). A decision to admit such evidence may be reversed only if the trial court abused its discretion. E. Cleary, *McCormick on Evidence* § 190, at 452-454 (2d ed. 1972). Whether, on the particular facts of this case, the court of appeals correctly concluded that the district court did not abuse its discretion in admitting the testimony in question pursuant to Fed. R. Evid. 404(b) does not raise an issue of general importance warranting review by this Court.

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[7]Petitioners never challenged the reliability of the co-conspirator declarations, either by cross-examining the government's witness on this point or by calling the absent co-conspirators themselves.

In any event, the district court did not abuse its discretion in this case. Petitioners argued that, although they had been present at the bidrigging meetings at issue here and had heard the rigging of these bids being discussed, they were "merely present" and had not agreed to rig bids.[8] See Voir Dire Tr. 147-148, 156; Tr. 37, 45, 93, 283. The Sixth Circuit correctly held that petitioners thereby put at issue the question of their intent to conspire (Pet. App. 6a).[9] Evidence of their prior participation in such conspiracies was consequently admissible to establish their intent to agree and to negate inadvertence, mistake or other innocent reasons for unlawful conduct.[10] Fed. R. Evid. 404(b); *United States* v. *Park, supra.*

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[8]Petitioners have implied that the government improperly offered the similar acts evidence to prove their propensity to commit the offense charged (see Pet. App. 5). This implication is false, as is clear from government counsel's repeated statements in the in camera hearings that the evidence was being offered to rebut the defendants' "no intent" or "mere presence" defense. See Tr. 385-386, 603, 609-611, 674, 684-685.

[9]Petitioners suggest (Pet. 16-19) that the Court should review this case to resolve the question whether evidence of prior similar acts is admissible when intent is simply an element of the offense and is not contested. That question is not presented here, since petitioners squarely placed intent in issue by claiming that their presence at bidrigging meetings was entirely innocent.

[10]Petitioners also contend (Pet. 21-22) that per se Sherman Act offenses are sui generis and thus beyond the scope of Fed. R. Evid. 404(b) because the basic intent to agree, which is the only *mens rea* that need be proved in per se cases, "is simply part of * * * the 'act' part of the crime — the agreement itself" (Pet. 22). Similarly, amicus curiae The Committee of Criminal Antitrust Defense Counsel argue (Br. 12) that this Court should grant review to decide "whether basic intent to agree is a separate issue from the act of agreement." This argument has no merit. If the basic intent to agree were not an element of a per se offense, no proof of mens rea would be required in such cases. But in *United States* v. *United States Gypsum Co.* 438 U.S. 422, 436 (1978), this Court concluded: "We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses." And neither petitioners nor amicus cites any case accepting their novel argument. In

3. Petitioners contend (Pet. 25-26) that this Court should grant review to decide whether in a per se Sherman Act prosecution, the government must prove an intent to effectuate the agreement's unlawful objective, as well as the basic intent to agree, or whether proof of the latter, coupled with proof of the illegal agreement, suffices. That issue, however, is not posed by the present case. As petitioners acknowledge (Pet. 26), every court of appeals that has considered the issue since *United States* v. *United States Gypsum Co.*, 438

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any event, since petitioners did not ask the district court to omit the instruction requiring the jury to find a basic intent to agree, they cannot now complain that no such element was required. Moreover, the Federal Rules of Evidence contain no exception for Sherman Act cases (see Fed. R. Evid. 101 and 1101). Thus, Rule 404(b) is applicable to the testimony in question.

Petitioners further complain (Pet. 23) that the court of appeals failed to defer to the trial court's discretion, because the appellate court disagreed with the trial court as to the basis for the statements' admission into evidence. After first admitting prior evidence of bidrigging on the proper ground — to show petitioners' intent to enter the bidrigging conspiracy — the trial court then decided that evidence of prior bidrigging was admissible to show intent to effectuate the object of the conspiracy. However, as the court of appeals noted (Pet. App. 6a), the government is not required to prove the latter type of intent in per se cases. Contrary to petitioners' assertion, the court of appeals' affirmance of the trial court's admission of the evidence on different grounds is not a basis for review by this Court. The settled rule is that an appellate court must affirm the decision below if the result is correct, even if the district court relied on a wrong ground or gave a wrong reason. *E.g.*, *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); *Olympic Fastening Systems, Inc.* v. *Textron, Inc.*, 504 F.2d 609, 618 (6th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *Krumholz* v. *Goff*, 318 F.2d 911, 912 (6th Cir. 1963) (on reh'g); *PAAC* v. *Rizzo*, 502 F.2d 306, 308 n.1 (3d Cir. 1974), cert. denied, 419 U.S. 1108 (1975). This principle is fully applicable to appellate review of evidentiary rulings. See, *e.g.*, *United States* v. *Maher*, 645 F.2d 780, 783-784 (9th Cir. 1981); *United States* v. *Baron*, 602 F.2d 1248, 1250-1252 (7th Cir.), cert. denied, 444 U.S. 967 (1979); *United States* v. *Baldarrama*, 566 F.2d 560, 567 (5th Cir.), cert. denied *sub nom. Bensor* v. *United States*, 437 U.S. 906 (1978); *United States* v. *Gocke*, 507 F.2d 820, 824 n.4 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975).

U.S. 422 (1978),[11] has held that the intent element of a Sherman Act violation is proven by evidence that the defendant knowingly conspired to engage in conduct deemed illegal per se, such as bidrigging.[12] While the district court in this case instructed the jury that the government must also prove that petitioners' participation in the bidrigging conspiracy was undertaken with the knowledge that their acts would have probable anticompetitive effects and that such effects occurred or that petitioners acted with the purpose of producing anticompetitive effects, this instruction merely increased the government's burden of proof and could only benefit petitioners.[13] And since petitioners do not dispute that the government's evidence in this case established their knowing participation in a bidrigging conspiracy, it is clear that the government proved the only intent element relevant in a per se Sherman Act case.[14]

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[11]In *United States Gypsum Co.*, the Court noted the two types of intent that must generally be proved in conspiracy cases and held that in certain antitrust prosecutions the jury must be instructed concerning both types of intent (438 U.S. at 434-446).

[12]See, *e.g.*, *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Society of Independent Gasoline Marketers*, 624 F.2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

[13]To be sure, the district court admitted certain prior bad acts to prove this intent, but as the court of appeals correctly held (Pet. App. 5a-7a), that evidence was admissible to prove the basic intent to agree.

[14]Petitioners suggest (Pet. 26-27 n.57) that the district court should have instructed the jury "that it must first find that anticompetitive effects took place before it could convict on the standard of knowledge of probable anticompetitive consequences * * *." But such an instruction was given in this case at petitioners' request (Tr. 1063-1064) even though it was unnecessary in a case charging a per se violation of the

4. Petitioners also contend (Pet. 27) that Vann's Sixth Amendment right to consult with counsel was violated because the court of appeals refused to postpone oral argument after Vann suffered a heart attack and lapsed into a coma during the pendency of the appeal. This argument has no merit. As Vann concedes (Pet. 27 n.58), the court had no obligation to hear oral argument at all. And as the court of appeals aptly observed (Pet. App. 10a), since appellate counsel had also served as trial counsel, there was no need to postpone oral argument in a case that had already been briefed. Petitioner Vann's Sixth Amendment rights were protected fully by his representation throughout his appeal by experienced and very able counsel familiar with the case.

Vann also suggests (Pet. 28) that the court's refusal to postpone argument effectively denied him his right to counsel as to all appellate proceedings, including the filing of his reply brief and other pleadings preceding oral argument. However, Vann failed to object to the filing of any pleadings, including his reply brief.[15] It thus seems quite clear that the court's refusal to postpone oral argument had no effect

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Sherman Act. See pages 9-10 n.10, *supra*. However, petitioners' instruction merely placed a greater burden of proof on the government than the law requires. Petitioners may not seek review to correct errors that could have hurt only the government. See, *e.g.*, *Killian* v. *United States*, 368 U.S. 231, 258 (1961); *United States* v. *Nickerson*, 606 F.2d 156, 158 (6th Cir.), cert. denied, 444 U.S. 994 (1979).

[15]Petitioners requested and received a two-week extension of time to file their reply brief on the ground that Vann was unconscious and unable to confer with counsel. See Motion of Appellants Vann and Melhorn for Extension of Time, filed November 15, 1982; granted by Order dated November 16, 1982. Petitioners' reply brief and their two unsolicited supplemental memoranda on the Confrontation Clause issue were filed without objection or request for further postponement. Petitioners did not move to postpone oral argument, set for February 23, 1983, until February 15, 1983. See Motion of Appellant Vann for Extension of Time, filed February 15, 1983.

on the preparation of the reply brief or any of Vann's other submissions, all of which had already been filed without objection. Moreover, this Court will not consider an issue not raised below. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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